Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

(3)

No. 88-568

RICHARD L. DUGGER, et al,

Petitioner,

v.

MACK RUFFIN, JR.,

Respondent.

**PETITIONER'S REPLY BRIEF
ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1.

Whether this Court should accept jurisdiction to summarily dispose of the case as the dissenting opinion below discloses that the panel did not consider harmless error in automatically vacating the death sentence for a Lockett-Hitchcock violation which is contrary to 28 U.S.C. s.2111? (As stated by Petitioner)

2.

Whether this Court should grant certiorari when other reasons, including a recent Supreme Court decision, Johnson v. Mississippi, __ U.S. __, 108 S.Ct. 1981 (1988), independently warrant the relief granted by the Eleventh Circuit? (As stated by Respondent)

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OTHER AUTHORITIES:

Rule 28-2(g)(iii),
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PRELIMINARY STATEMENT

Petitioner files this supplemental brief to answer the arguments set forth by Respondent; and Petitioner continues to urge reasons why this Court might well be inclined to grant the writ.

REASONS FOR GRANTING THE WRIT

ISSUE I

> Whether this Court should accept jurisdiction to summarily dispose of the case as the dissenting opinion below discloses that the panel did not consider harmless error in automatically vacating the death sentence for a Lockett-Hitchcock violation which is contrary to 28 U.S.C. s.2111? (As stated by Petitioner)

Respondent's argument is that Petitioner failed to argue harmless error in his lead brief below; and, thus is now precluded from urging harmless error as a basis for this Court's review.

What Respondent overlooks and fails to consider is that harmless error was presented by Mr. Dugger to the Eleventh Circuit. Briefs filed in the Eleventh Circuit are governed by their local rules. The significant local rule is U.S. Ct. of App. 11th Cir. Rule 28-2(g)(iii), 28 U.S.C.A. This rule addresses briefs and their contents. Specifically, the Rule states:

(g) **Statement of the Case.** In the statement of the case, as in all other sections of the brief, every assertion regarding matter in the record shall be supported by a reference to the volume, document number and page number of the original record where the matter relied upon is to be found. The statement of the case shall include:

(i) course of proceedings and dispositions in the court below. IN A CRIMINAL CASE THE PARTY SHOULD STATE WHETHER THE DEFENDANT IS INCARCERATED;

(ii) a statement of the facts. A proper statement of facts reflects a high standard of professionalism. It must state the facts accurately, those favorable and those unfavorable to the party. Inferences drawn from facts must be identified as such.

(iii) a statement of the standard or scope of review for each contention. For example, where the appeal is from an exercise of district court discretion, there shall be a statement that the standard of review is whether the district court abused its discretion. The appropriate standard or scope of review for other contentions should be similarly indicated, e.g., that the district court erred in formulating or applying a rule of law; or that there is insufficient evidence to support a verdict; or that fact findings of the trial judge are clearly erroneous under Fed.R.Civ.P.

> 52(a); or that there is a lack of substantial evidence in the record as a whole to support the factual findings of an administrative agency, or that the agency's action, findings and conclusions should be held unlawful and set aside for the reasons set forth in 5 U.S.C. s. 706(2).

The local rule directs the parties to set forth the standard and/or scope of review for each contention. See, U.S. Ct. of App. 11th Cir. Rule 28-2(g)(iii), 28 U.S.C.A. Your Petitioner published the following as his last paragraph in his statement of the case:

> "Matters of law are, of course, subject to the normal harmless error standard of review."
>
> (Brief of Respondents/Appellees Cross-Appellants at page 7)

Petitioner has not defaulted below in asserting that the proper scope of review and/or traditional standard of review for a collateral habeas court is harmless error. Petitioner, in his lead brief below, urged that certiorari had been

granted in Hitchcock v. Wainwright, No. 85-6576, and that oral argument was calendared for October 15, 1986. This Court rendered its Hitchcock decision on April 22, 1987. Oral argument in the Eleventh Circuit on behalf of Mack Ruffin was January 21, 1987, prior to this Court's opinion in Hitchcock. Subsequently, after this Court spoke in Hitchcock, Judge Hatchett, below, rendered an Order on May 4, 1987, barring further supplemental briefing. The collateral record proper below demonstrates that Mr. Ruffin sought to file supplemental briefs on recent Eleventh Circuit cases which addressed Hitchcock. Had supplemental briefing been allowed, the custodian would have amplified that this Court's decision in Hitchcock assumes that harmless error is a reasonable possibility in all cases. The Hitchcock case does not involve fundamental error. Thus, had Judge Hatchett not barred supplemental briefing,

your Petitioner would have had an opportunity to have pointed out the distinction between fundamental error and constitutional error, which, of course, is subject to a harmless error analysis.

As Petitioner urged the harmless error doctrine as the standard of review for the contentions before the Court below, it cannot be said that there is a waiver; by-pass; or, procedural default which acts as a bar to this Court's consideration of the Hitchcock claim. Thus, Petitioner does not concede that he raised the "harmless error" argument for the first time in the motion for rehearing in the Court of Appeals. The issue was timely raised in the lead brief filed by Mr. Dugger below when the traditional "harmless error" standard of appellate review was advocated as to matters of law. Under these procedural circumstances, the issue was raised in a timely manner and this Court's consideration of the question

is not precluded under Hoover v. Ronwin, 466 U.S. 558, 475 n.25, 80 L.Ed.2d 590, 603 n.25, 104 S.Ct. 1989 (1984).

Petitioner has perfected the issue below by urging matters of law are subject to harmless error analysis pursuant to U.S. Ct. of App. 11th Cir. Rule 28-2(g)(iii), 28 U.S.C.A. With this in mind, Judge Tjoflat is most correct in his dissent. It cannot be said on this record that the parties did not present harmless error to the panel below. Thus, the declination below to entertain "harmless error" is squarely inconsistent with 28 U.S.C. Section 2111.

Petitioner, in summary, fails to apprehend how this Hitchcock error was harmful as Mr. Ruffin was never precluded from offering non-statutory, mitigating evidence in the sentencing phase of his trial. Petitioner continues to maintain that this Court may well be inclined to grant its writ. To grant certiorari would

certainly give guidance to the lower federal courts as to the role of 28 U.S.C. s.2111 in habeas reviews. With the continuing increase of 28 U.S.C. s.2254 cases, there would be a national impact in setting further guides for collateral review. Respondent fails to establish reasons for this Court to decline granting the writ.

ISSUE II

Whether this Court should grant certiorari when other reasons, including a recent Supreme Court decision, Johnson v. Mississippi, __ U.S. __, 108 S.Ct. 1981 (1988), independently warrant the relief granted by the Eleventh Circuit? (As stated by Respondent)

To the extent that Respondent argues there are independent reasons which warrants the habeas relief granted by the Eleventh Circuit, Respondent's reliance on Johnson v. Mississippi, 486 U.S. __, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988) is misplaced. Petitioner would point out that Mack Ruffin prosecuted a direct appeal from his conviction in the first degree murder of Deputy Lonnie Coburn. There, on March 9, 1978, a Hernando County Florida grand jury indicted Respondent and Freddie Lee Hall for the first degree murder of Deputy Coburn. Respondent pled not guilty and venue was changed, on Respondent's motion, to Lake County

Florida. Thereafter, after this joint trial, Respondent and Freddie Lee Hall were found guilty of the first degree murder of Deputy Coburn. The trial then moved into the sentencing phase where the jury recommended life imprisonment for Respondent and death for Freddie Lee Hall. The state trial court adopted the jury recommendations. Mr. Ruffin prosecuted a direct appeal; and, his judgment and sentence was affirmed. See, Ruffin v. State, 390 So.2d 841 (Fla. 5th DCA 1984) (per curiam affirmed). The Florida Supreme Court reduced Freddie Lee Hall's conviction to second degree murder. Justice Boyd filed a strong dissent urging that there was substantial, competent evidence upon which the jury could have found Hall and Ruffin equally guilty, as joint perpetrators, of premeditated murder, regardless of which one actually fired the bullet that killed Officer Coburn. The Florida Supreme Court in Mack

Ruffin's direct review of the Karol Hurst homicide noted that Ruffin's conviction for the killing of Deputy Coburn had been affirmed by the District Court of Appeal, Fifth District. See, Ruffin v. State, 397 So.2d 277 (Fla. 5th DCA 1980).

Why has Mack Ruffin not returned to the state court and prosecuted a post-conviction attack under Fla.R.Crim.Pr. 3.850? To Respondent's knowledge, he has not; and, now, under state law, it is too late for a post-conviction attack. See, In re Rule 3.850, 481 So.2d 480 (Fla. 1985). Thus, there is a bar to such an attack which might perfect a Johnson v. Mississippi, 486 U.S. __, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988) claim. The Florida state courts enforce its procedural default rules against delayed petitions. See, Delap v. State, 513 So.2d 1050 (Fla. 1987). Even if the first degree murder judgment in Ruffin v. State, 390 So.2d 841 (Fla. 5th DCA 1984) were set aside, this

claim remains an academic abstraction. In Hall v. Wainwright, 733 F.2d 766, 774 (11th Cir. 1984), cert. denied, 105 S.Ct. 2344 (1985), the court below summarily disposed of this issue:

> (5) Whether the Conviction for Killing the Policeman was Improperly Utilized to Show the Aggravating Circumstances of Prior Criminal History
>
> Hall claims that because the Supreme Court of Florida reduced his sentence for murdering the police officer from first to second degree murder, the conviction should not have been used to show the aggravating circumstances of prior criminal history. **Hall v. State**, 403 So.2d 1319 (Fla. 1981). Hall contends that this error deprived him of his rights under the eighth amendment to a fair and reliable determination of his penalty. The state contends the utilization of the police officer's murder was proper to support an aggravating circumstance of prior criminal history.
>
> [15] Hall's claim lacks merit. Under Florida law, an aggravating circumstance exists when a defendant has been "previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Fla.Stat.Ann. s.921.141(5)(b)

> (West Supp.1983). A second degree murder conviction satisfies this standard. Therefore, the police officer's murder was properly utilized to find the aggravating circumstance of prior criminal history. Furthermore, Hall's 1968 conviction for assault with intent to commit rape was before the trial court and was sufficient to support the existence of this aggravating circumstance.
>
> (text of 733 F.2d at 774)

Freddie Lee Hall's judgment was reduced to a second degree murder conviction; and, on collateral review, it had no merit. Here, Mack Ruffin is now precluded from returning to state court to attack the judgment. See, In re Rule 3.850, 481 So.2d 480 (Fla. 1985). Even if the first degree murder conviction in the Coburn killing were reduced to second degree murder, the claim lacks merit. Thus, Respondent's reliance on Johnson v. Mississippi, 486 U.S. __, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988) is misplaced as he cannot completely invalidate his Lonnie

Coburn conviction. Even if Mr. Ruffin were successful on a collateral attack, his extent of relief would be to have his first degree murder conviction reduced to and reinstated as a second degree murder conviction. Procedurally, this does not present a colorable Johnson contention such as noted by this Court in Burr v. Florida, 101 L.Ed.2d 878, 108 S.Ct. 2840 (1988) and as rejected by Judge Alcee Hastings in Blanco v. Dugger, 691 F.Supp. 308, 316 (S.D.Fla. 1988) collateral appeal pending Dugger v. Blanco, 11th Cir. Case No. 88-5758. Thus, Johnson v. Mississippi does not warrant habeas relief.

To the extent Respondent suggests that Maynard v. Cartwright, 486 U.S. __, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988) requires a new sentencing procedure, he overlooks that this court subjected the Florida statutory language ["especially heinous, atrocious, or cruel"] to review in Proffitt v. Florida, 428 U.S. 242, 49

L.Ed.2d 913, 96 S.Ct. 2960 (1976). This Court found that the statutory construction of this language by the Florida Supreme Court in Tedder v. State, 322 So.2d 908, 910 n.3 (Fla. 1975) gives sufficient guidance to a jury. This Court noted that the Florida commentary on the statute construes it as "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." In Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980), this Court approved Proffitt. Basically, Maynard is simply a reaffirmation and application of the Godfrey decision. Thus, this is not new law which would support the Court below issuing the great writ.

CONCLUSION

As Mr. Ruffin's custodian has established that "harmless error" was urged under U.S. Ct. of App. 11th Cir. Rule 28-2(g)(iii), 28 U.S.C.A., there is no preclusion to Petitioner urging "harmless error" to this Court. Thus, Mr. Ruffin's custodian asks this Court to issue its most gracious Writ of Certiorari granting summary reversal of the decision below with instructions that the Court of Appeals consider and apply 28 U.S.C. s.2111 and Chapman v. California prior to automatically vacating a death sentence for a Lockett/Hitchcock violation.

Respectfully submitted,
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